

No. _____

05-630 NOV 14 2005

In The OFFICE OF THE CLERK
Supreme Court of the United States

LAWRENCE WEST, JR. and RENN WEST,

Petitioners,

vs.

DYNACORP, a Virginia Corporation, NATIONAL FLIGHT
SERVICES, INC., a Florida Corporation, NATIONAL
FLIGHT SERVICES, INC., an Ohio Corporation, MARTIN
BAKER AIRCRAFT COMPANY, WEBER AIRCRAFT,
INC., a foreign corporation, and DOES 1 through 10,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a district court violate the Seventh Amendment right to a jury trial by resolving disputed issues of material fact during a pre-trial evidentiary hearing without a jury over the objection of the plaintiffs and then subsequently label the proceeding a bifurcated bench trial over plaintiffs' objection?

2. Can the common law created Borrowed Servant Doctrine be applied to the exclusive remedy provision of the Defense Base Act codified at 42 U.S.C. § 1651(c) where the alleged borrowing employer does not directly supervise the borrowed employee?

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OPINIONS BELOW

The opinion of the court of appeals (App. 1a-4a) is unreported. The district court's opinions (App. 6a-19a) are also unreported.

JURISDICTION

The district court had jurisdiction over the underlying action pursuant to 28 U.S.C. § 1332 because the citizenship of the parties was diverse. On August 3, 2004, the United States District Court for the Middle District of Florida granted DynCorp's motion for entry of final judgment. (App. 19a). The district court formally entered final judgment in favor of DynCorp on August 4, 2004. (App. 20a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) to review the district court's final order and order of partial judgment delivered from the bench on April 21, 2004.

On August 31, 2004, the Wests filed and served their notice of appeal. The appeal filed within thirty days from the district court's entry of final judgment was timely pursuant to F. R. App. 4(a)(4)(v). On August 15, 2005, the Circuit Court of Appeals issued an opinion affirming the district court and thereafter entered judgment on September 13, 2005. (App. 21a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The important federal issues presented in this case stem from the lower courts' denial of plaintiffs' right to a

jury trial afforded by the U.S. Constitution Seventh Amendment to the United States Constitution. The district court's action in transforming a pre-trial evidentiary hearing into a bifurcated bench trial, despite plaintiffs' objections, also concerns Federal Rule of Civil Procedure 42.

The Seventh Amendment provides, "in suits at common law, when the value of controversy shall exceed twenty dollars the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law."

The lower courts also erred by rejecting the direct supervisory control standard of the Borrowed Servant Doctrine and adopting an ultimate contractual authority standard in determining whether the exclusive remedy provision of the Defense Base Act ("DBA") codified at 42 U.S.C. § 1651(c) barred the plaintiffs' claims. The Defense Base Act is an extension of the Longshore and Harbor Worker's Compensation Act, 33 U.S.C. § 901 *et seq.*

Section 1651(c) reads as follows:

(c) Liability as exclusive

The liability of an employer, contractor (or any subcontractor or subordinate subcontractor with respect to the contract of such contractor) under this chapter shall be exclusive and in place of all other liability of such employer, contractor, subcontractor, or subordinate contractor to his employees (and their dependents) coming within the purview of this chapter, under the workmen's compensation law of any State, Territory, or other jurisdiction, irrespective of the place where

the contract hire of any such employee may have been made or entered into.

The district court and Eleventh Circuit Court of Appeals' rulings conflict with the rules of other circuit courts of appeals and depart from the accepted and usual course of judicial proceedings and call for an exercise of this Court's supervisory power.

STATEMENT OF THE CASE

Factual Background

This case arises from the February 6, 2000 crash of a Rockwell OV10-D aircraft in Larandia, Columbia, South America that seriously injured Lawrence West. At the time of the accident, Mr. West was flying a narcotics spray eradication mission on behalf of the Department of State, Bureau of International Narcotics and Law Enforcement Affairs ("DOS" and "INL"). (App. 5a, 38a-39a).

The DOS/INL aerial narcotics eradication program in Larandia, Columbia is carried out by the prime contractor, DynCorp. (App. 10a, 39a). DynCorp provides maintenance operations to the eradication aircraft and other contractual administrative duties. (App. 10a). As the prime contractor DynCorp owed ultimate responsibility to the Department of State and had authority over the execution of the prime contract directives. (App. 39a-49a).

DynCorp delegated duties under the prime contract to perform all aerial spray eradication missions to Eagle Aviation Services Technology, Inc. (EAST) through a subcontract. (App. 11a). Mr. West was a Line Pilot and contractual employee of EAST working in the DOS/INL program

at Larandia, Columbia pursuant to the subcontract. (App. 7a, 41a, 57a).

EAST maintained an office for the Chief Pilot at DynCorp headquarters at Patrick Air Force Base. (App. 41a-49a). EAST maintained an office for its Lead Standardization Pilot at DynCorp headquarters in Bogota, Columbia. (App. 41a-49a). EAST maintained an office for its Lead Pilot at DynCorp headquarters in Larandia, Columbia. (App. 41a-49a). DynCorp's president testified that "[t]he leads [EAST lead pilots] would in fact give daily direction as to where their employees would go, but the [DynCorp airbase] manager's overall in charge." (App. 43a). EAST exercised direct supervisory control over Mr. West. (App. 56a-61a).

District Court Proceedings

On March 23, 2004, the district court heard oral argument on DynCorp's motion for summary judgment alleging *inter alia* workers' compensation immunity under the exclusive remedy provision of the Defense Base Act through the application of the common law Borrowed Servant Doctrine. (App. 28a-35a). The parties agreed that Mr. West's status as DynCorp's borrowed servant was an issue for the district court to decide as a matter of law. (App. 30a). The district court determined genuine issues of material facts existed concerning Mr. West's borrowed servant status that precluded summary judgment on the record presented. (App. 7a-8a, 29a-30a).

At the March 23, 2004 hearing the district court stated "I'm inclined to think that maybe what we ought to do is to have a preliminary bench trial of some sort and get a complete record. . . ." (App. 30a). Plaintiffs objected to

this proposal and stated "my suggestion is that we rule as a matter of law today." (App. 31a). After a short recess the Court stated "[n]ow, on the worker's comp issue, we did take a quick look at some cases. I think it's pretty clear that that is a question of law for the Court. And on that particular issue, I do think it would behoove us to have a pretrial evidentiary hearing." (App. 33a).

The docket reflects that on March 25, 2004 the district court made the following entry. [t]ake notice that a hearing on employer immunity defense under 42 U.S.C. § 1651 and 33 U.S.C. § 901 will be held at 1:30 p.m. on 4/24/04. (App. 25a). However, the docket entry entered on April 20, 2004 stated "BIFURCATED TRIAL ON EMPLOYEE IMMUNITY DEFENSE held on April 20, 2004." (App. 26a).

On April 20, 2004, the district court stated the parties were appearing for a "bifurcated bench trial on the worker's comp immunity defense raised by DynCorp." (App. 37a). After an inquiry from plaintiffs' counsel, the district court corrected itself and stated "[i]t's a bifurcated proceeding. If I used trial inappropriately, I'm sorry." (App. 38a). DynCorp attacked the credibility of plaintiffs' witness and the Wests objected to the relevancy of this line of questioning due to the fact that credibility determinations were not appropriate during pre-trial evidentiary hearings. (App. 55a-56a).

The following day, the district court advised "[w]e're here this morning for a continuation of the hearing regarding defendant's motion for summary judgment as it relates to the worker's comp immunity defense. . . ." (App. 63a). During oral argument, the Wests argued the district court could not make credibility determinations at a pre-trial

evidentiary hearing. (App. 64a). The district court stated the Borrowed Servant Doctrine was to be determined as a matter of law and that the court was free to assess the credibility of witnesses. (App. 67a).

After oral argument, the district court issued an oral order finding in favor of DynCorp and stated that the proceeding had been an evidentiary hearing (App. 65a); however, it rendered credibility determinations. (App. 67a). The district court discounted one of plaintiffs' witnesses' testimony in its entirety and resolved all disputed issues of fact. (App. 71a-72a).

The district court dismissed plaintiffs' tort claims because it determined Mr. West was DynCorp's borrowed servant and the exclusive remedy provision of the Defense Base Act ("DBA") codified at 42 U.S.C. § 1651(c) thereby conferred immunity to DynCorp. (App. 71a). The district court's decision was based on the fact that DynCorp was the prime contractor and had ultimate authority over EAST as the subcontractor and discounted plaintiffs' argument that direct supervisory control was the proper standard. (App. 65a-70a).

Proceedings On Appeal

On appeal the Wests argued that the district court had improperly usurped the role of the jury by deciding disputed issues of material fact on a summary judgment motion. The district court had repeatedly stated its intention to conduct an evidentiary hearing. Even at the hearing the district court corrected the docket entry noting the hearing as a bifurcated bench trial. The district court then decided the disputed issues as if the hearing were a bench trial. The appeal court ruled that the Wests waived their

right to a jury trial merely by participating in the evidentiary hearing/bench trial. The court also affirmed the district court's determination that West was DynCorp's borrowed servant and adopted the analysis of the district court.

REASONS FOR GRANTING THE PETITION

The lower courts violated the West's Seventh Amendment right to a jury trial. The Seventh Amendment afforded the Wests the right to have a jury decide disputed issues of material fact based on the existence of an employment relationship and the right to control an employee. See *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 331, 95 S.Ct. 472, 480, 42 L.Ed.2d 498 (1974); *Brown v. Union Oil Company of California*, 984 F.2d 674, 679 (5th Cir. 1993); *Gaudet v. Exxon Corporation*, 562 F.2d 351, 358 (5th Cir. 1977); *Kiff v. Traveler's Ins. Co.*, 402 F.2d 129, 131 (5th Cir. 1968).

Federal Rule of Civil Procedure 42(b) permits a district court to order the separate trial of any separate issue while "always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution." See *State of Alabama v. Blue Bird Cody Co.*, 573 F.2d 309, 318 (11th Cir. 1978).

The Wests were unaware of the district court's intention to treat the proceeding as a bifurcated bench trial given the numerous references to an evidentiary hearing. The district court even corrected itself when it mistakenly announced the parties were present for a bifurcated bench trial. To suggest that the plaintiffs waived their right to a jury trial defies the record and amounts to a violation of